

Supreme Court, U. S.

F I L E D

FEB 13 1978

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77-972

JERRY SCOTT MORGAN, Petitioner

V.

THE STATE OF TEXAS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF
THE STATE OF TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

PAGE

STATEMENT OF THE CASE 1

ARGUMENT

THE DECISION BELOW IS CLEARLY CORRECT 4

CONCLUSION. 7

CERTIFICATE OF SERVICE. 8

APPENDIX. 9

CITATIONS

	PAGE
Baines v. State, 520 S.W. 2d 401 (Tex. Crim. App...1975).	5
Lopez v. State, 535 S.W. 2d 643 (Tex. Crim. App...1976). . .	5
United States v. Johnston, 268 U.S. 220 (1925).	4, 7

ARTICLES

Article I, § 9, Texas Constitution	5
Article 18.01, Vernon's Ann. C.C.P.	5

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STATEMENT OF THE CASE

The State's evidence shows that on the 15th day of November, 1975, police officers Ashley, Cashion and Smith executed a search warrant on the apartment residence located at 2129 Hendricks, Number 130, Arlington,

Tarrant County, Texas (pp. 11, 77, 187, ROA). Upon entering the front door of the apartment, they immediately saw Appellant sitting at a table (pp. 17, 79, ROA), talking on a telephone (pp. 17, 67, 79, 168, ROA), and writing on a piece of paper with a pen (pp. 79, 169, 202, ROA). The piece of paper upon which Appellant was writing (SX7, p. 98, ROA) was a "bet slip" for a parley bet for money by bettor number "7020" on a football game (pp. 181, 195, 210, ROA). Appellant was arrested for Gambling Promotion (p. 218, ROA).

Also seized at the time of arrest were a "bettors list" (SX1, pp. 22-27, ROA) and "settle-up sheets" (SX2, p. 30, ROA) found on Appellant's person in his bill-fold (pp. 19, 20, 28, 187, 189, ROA) plus "line sheets" (SX5, pp. 94-95, ROA, and SX6, pp. 96-97, ROA) and "bet slips" (SX8, p. 99, and SX9, pp. 100-101, ROA)

found in front of Appellant at the table (pp. 182, 114, 174, 178, 179, 184, ROA). During the execution of the warrant, the telephone rang ten to twelve times (pp. 171, 172, ROA).

State's witness Lowe testified that at the time of the execution of the warrant he resided at the subject apartment (p. 230, ROA), but that Appellant had been over several times (pp. 233, 234, ROA). Lowe confirmed that at the time of the officers' entry, Appellant was seated at the table answering the telephone with a pen in his hand (pp. 236, 237, ROA) and that the papers that officers took from the table in front of Appellant had not been there prior to Appellant's arrival at the apartment that day (p. 236, ROA).

ARGUMENT

I

THE DECISION BELOW IS CLEARLY CORRECT

Initially it should be pointed out to this Court that the central issue of Petitioner's complaint, in all courts in which he has sought review of his conviction, is that there was no probable cause stated in the affidavit for the search warrant. This may be seen by examining the three grounds of error concerning the search warrant, raised before the Court of Criminal Appeals. (See Appendix A). It is therefore apparent that what Petitioner actually seeks in his petition for certiorari is a review of the evidence. This request is in contradiction of the rule of this Court that it does not grant certiorari to review evidence and discuss specific facts. United States v. Johnston, 268 U.S. 220 (1925).

Assuming, arguendo, that this Court may feel compelled to examine Petitioner's reasons for granting the writ, Respondent will discuss Petitioner's allegations of error. For the sake of brevity, Respondent will combine all of Petitioner's allegations.

It is well settled in Texas that the courts will not look behind the four corners of an affidavit for a search warrant. Article I, § 9, Texas Constitution; Article 18.01, Vernon's Ann. C.C.P.; Lopez v. State, 535 S.W. 2d 643 (Tex. Crim. App...1976). This rule also applies to the Court of Criminal Appeals. Baines v. State, 520 S.W. 2d 401 (Tex. Crim. App... 1975). In answering Petitioner's allegations the Court of Criminal Appeals noted the rule in Federal Courts.

In passing, we observe in federal courts it has been held that unintentional misrepresentations in a search warrant affidavit will not invalidate the search warrant

unless the affidavit, viewed without the erroneous statements, is insufficient to constitute probable cause. If, however, the misrepresentations are shown to be intentional, the affidavit will be invalid regardless of whether the error is material to a showing of probable cause. United States v. Parks, 531 F.2d 754 (5th Cir. 1976); United States v. Hunt, 496 F.2d 888 (5th Cir. 1974); United States v. Thomas, 489 F.2d 664 (5th Cir. 1973), cert. denied, 423 U.S. 844 (1975); United States v. Morris, 477 F.2d 547 (5th Cir. 1973), cert. denied, 414 U.S. 852 (1973); United States v. Jones, 475 F.2d 723 (5th Cir. 1973), cert. denied, 414 U.S. 841 (1973); United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971), cert. denied, 405 U.S. 934 (1972).

(Exhibit A-10 and A-11, Petition)

The Court then went on to state:

Even if we were to follow the federal rule, no reversible error would be reflected. There is no showing without the statements in question, the affidavit would still reflect probable cause.

(Exhibit A-11, Petition)

It is therefore apparent that in order to grant a writ of certiorari in

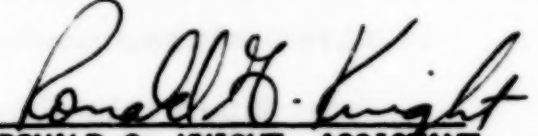
this case, this Court would be required to violate the rule United States v. Johnston, supra. Based on the findings of the Court of Criminal Appeals that there was probable cause even without the statements in question, there is no valid reason for this Court to ignore its own well settled rule.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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place to be searched, and therefore, vitiates the search warrant; such not having been issued upon probable cause as required by law.

FIFTH POINT OF ERROR

The Trial Court erred in failing to grant APPELLANT'S MOTION TO SUPPRESS THE SEARCH WARRANT herein for failure of same to reflect adequate probable cause, in that there are not sufficient underlying circumstances presented by affidavit to fustify (sic) the conclusion that Appellant was in possession of the contraband alleged, at the time of application for the search warrant concerned.

APPENDIX "A"